87-690

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

STEVEN PETRONE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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BEST AVAILABLE COPY

Petitioner, Steven Petrone, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 14, 1987.

QUESTIONS PRESENTED FOR REVIEW

This case involves a "split in the circuits". In some circuits, a falsehood on one's income tax return is "material"—as that word is meant in 26 U.S.C. §7206(1)—if it affects the correct computation of one's tax. In other circuits, a falsehood is "material" if it might likely impede the I.R.S. in the investigation or auditing of the return.

In light of the "split in the circuits", and in light of the fact that—until this case—the Third Circuit followed the standard by which a falsehood is material if it affects the correct computation of one's tax, the decision of the United States Court of Appeals for the Third Circuit raises the following issues:

I. Whether, under 26 U.S.C. §7206(1), a falsehood on one's income tax return is "material" only if it affects the computation of one's tax?

II. Whether the court of appeals violates 26 U.S.C. §7206(1) by rendering its materiality clause a nullity, i.e., by construing "material" falsehoods to mean falsehoods that *might be* material?

III. Whether, by its unforeseeable and retroactive judicial expansion of the materiality clause of 26 U.S.C. §7206(1), the court of appeals violates the Petitioner's due process right of fair warning. *Bouie v. Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed. 2d 894 (1964)?

ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES OF APPEALS FOR THE THIRD CIRCUIT

Steven Petrone	United States of America (Office of the United States Attorney for the Western District of Pennsylvania)

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OPINION BELOW

The "Memorandum Opinion" of the United States Court of Appeals for the Third Circuit was rendered on June 16, 1987. It is not reported, but a copy is set forth in the Appendix hereto (Appendix, hereafter referred to as "App.").

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1987. A petition for rehearing was denied on July 14, 1987 (App. 1a-8a)

This petition for writ of certiorari is being filed within sixty (60) days of rehearing, and this Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, United States Constitution:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . . "

STATEMENT OF THE CASE

A. History

On December 12, 1985, Petrone and 13 others were indicted in the U.S. District Court for the Western District of Pennsylvania at Cr. No. 85-275. Counts 1 through 9, and counts 12 through 16 (of the 17 count indictment) pertain to Petrone. The first 9 counts involve the distribution of marijuana. Counts 12 through 16 involve false statements on Petrone's federal income tax returns.

On April 17, 1986, Petrone pled guilty to count 9 and to counts 12 through 15. On July 30, 1986, the district

court adjudged him guilty, and imposed sentence. At count 9, the court committed Petrone to the custody of the Attorney General for ten years. The court also imposed a $100,000.00 fine and a $50.00 Special Assessment.

At count 12, the court committed Petrone to the custody of the Attorney General for three years. At count 13, the court committed Petrone to the custody of the Attorney General for three years. At count 14, the court committed Petrone to the custody of the Attorney General for two years. At count 15, the court committed Petrone to the custody of the Attorney General for two years, and imposed a $50.00 Special Assessment. The total term of commitment for counts 12 through 15 is ten years.

From the judgment of sentence at counts 12 through 15, Petrone filed a timely notice of appeal to the United States Court of Appeals for the Third Circuit. On June 16, 1987, the Court of Appeals affirmed the judgment of sentence and, on July 14, 1987, the Court of Appeals denied rehearing. The within petition follows.

B. Facts

At counts 12 through 15, Petrone is charged with violations of 26 U.S.C. §7206(1). Each count refers to a particular tax return. For each of the years—running from 1981 through 1984—Petrone is alleged to have made a tax return "containing a written declaration which he did not believe to be true or correct as to every *material* matter." The falsehoods involve representations that Petrone worked as a consultant for P & T Trucking, Inc., and that from "P & T", he received employment income. The government alleges that these representations were false—that Petrone was not so employed, and that the income he received from "P & T" was "repayment of monies Petrone

had provided the owner of [P & T] in order to conceal the true nature of the income."

At the guilty plea colloquy, Petrone admitted that he knew the returns were not true. On appeal, the issue which gives rise to the ones raised herein is whether there is a factual basis for the guilty plea at counts 12 through 15. Additional facts as they pertain to specific issues will be set forth herein.

ARGUMENT

Introduction

This case involves a conflict in the circuits. That conflict concerns the legal standard by which courts decide whether a falsehood on one's income tax return is "material" under 26 U.S.C. §7206(1).[1] It also involves the means by which the court of appeals construes the "materiality" clause of §7206(1), and thereby violates the Due Process Clause by unforeseeably enlarging the scope of the conduct which §7206(1) prohibits.

In some circuits, a falsehood is "material" only if it affects the correct computation of one's tax. *United States v. Graham*, 758 F.2d 879, 886, n.5, (3d Cir. 1985); *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969); *United States v. Warden*, 545 F.2d 32, 37 (7th Cir. 1976); *United States v. Strand*, 617 F.2d 571, 573 (10th Cir. 1980). The court of appeals—in *this* case—correctly notes that, under this standard" . . . the record does not establish any factual basis for the conclusion that [Petrone's] false returns

[1]Under the first standard, the falsehood in this case is *not* material. Under the second, it is. See infra, p. 6. Before this case, the court of appeals recognized only the first standard. In this case, however, the court of appeals adopts the second.

resulted in an inaccurate calculation of tax liability." (App. 4a-5a)

In other circuits, a falsehood is material if it *might* likely impede the Internal Revenue Service in the investigation and auditing of one return. *United States v. Romanow,* 509 F.2d 26, 28 (1st Cir. 1975); *United States v. Greenberg,* 735 F.2d 29, 31 (2d Cir. 1984); *United States v. Tsanas,* 572 F.2d 340, 343 (2d Cir. 1978); *United States v. Taylor,* 574 F.2d 232, 235 (5th Cir. 1978); *United States v. Holecek,* 739 F.2d 331 (8th Cir. 1984).[2]

In this case, the court of appeals acknowledges that there are two conflicting standards, and that heretofore, the Third Circuit has followed the standard which exculpates Mr. Petrone, but having done so, the court of appeals hastily adopts the latter standard, under which a falsehood " . . . is material if it has 'the *potential* for an obstructive or inhibitive effect.' *United States v. Greenburg,* [sic] 735 F.2d 29, 31 (2nd Cir. 1984)." (emphasis added) (App. 5a) It proceeds under this latter standard to conclude that there is a factual basis for the conviction.[3]

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[2]The Seventh Circuit used to apply the latter standard, *United States v. DiVarco,* 484 F.2d 670 (7th Cir. 1973), but it now applies the prior "correct computation" standard. *United States v. Warden, supra,* p. 5.

[3]The underlying issue arises under Rule 11 of the Federal Rules of Criminal Procedure which requires a factual basis for a guilty plea.

I. UNDER 26 U.S.C. §7206(1), A FALSEHOOD ON ONE'S INCOME TAX RETURN IS "MATERIAL" ONLY IF IT AFFECTS THE COMPUTATION OF ONE'S TAX.

II. THE RULING OF THE COURT OF APPEALS VIOLATES 26 U.S.C. §7206(1) BY RENDERING ITS MATERIALITY CLAUSE A NULLITY, I.E., BY CONSTRUING "MATERIAL" FALSEHOODS TO MEAN FALSEHOODS THAT *MIGHT* BE MATERIAL.

26 U.S.C. §7206(1) prohibits the act of

> "ma[king a tax] return . . . containing a written declaration . . . which [one] does not believe to be true and correct as to every *material* matter." (emphasis added)
>
> "The test of materiality with respect to a false return case 'is whether a particular item must be reported' in order that the taxpayer estimate and compute his tax correctly. *United States v. Null,* 415 F.2d 1178, 1181 (4th Cir. 1969)." *United States v. Warden,* 545 F.2d 32, 37 (7th Cir. 1976).

Relying on *Warden* and *Null,* the court of appeals had occasion recently to observe,

> " . . . it is established that a misstatement on a return is material if . . . it results in an incorrect computation of the tax." *United States v. Graham,* 758 F.2d 879, 886, n.5 (3d Cir. 1985).

Also, see *United States v. Strand,* 617 F.2d 571, 573 (10th Cir. 1980).

In this case, the court of appeals acknowledges these cases, but also notes that other

> "circuits have chosen a broad view of materiality, which is consistent with the need for effective enforcement of the tax revenue statutes. See *United States v. Holecek*, 739 F.2d 331 (8th Cir. 1984); *United States v. Greenburg*, [sic] 735 F.2d 29 (2d Cir. 1984); *United States v. Taylor*, 574 F.2d 232 (5th Cir. 1978); *United States v. Romanow*, 509 F.2d 26 (1st Cir. 1975). Under this view, a misstatement is material if it has 'the potential for an obstructive or inhibitive effect.' *Greenburg*, [sic] 735 F.2d at 31." (App. 5a)

In spite of the language of 26 U.S.C. §7206(1), and in spite of its comments in *Graham*—the court of appeals adopts what it calls the broader view of materiality.

The "broader view of materiality" is really no view of materiality at all. Instead, the court of appeals confuses what *might* be material with what *is* material. It confuses what has the mere *potential* for obstructing or inhibiting the I.R.S. with what *actually* obstructs or inhibits.

This case involves the primary issue of statutory construction. In that regard, this Court has made it clear that any

> " '[a]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' *Rewis v. United States*, 401 U.S. 808, 812, 28 L.Ed.2d 493, 497, 91 S.Ct. 1056 (1971) . . . 'Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.' " *United States v. Bass*, 404 U.S. 336, 347-8, 92 S.Ct. 515, 30 L.Ed.2d 488, 496-7 (1971). (citations and footnote omitted)

Also, see *Busic v. United States*, 446 U.S. 398, 406, 100 S.Ct. 1747, 64 L.Ed.2d 381, 389 (1980).

That the "materiality" clause of 26 U.S.C. §7206(1) is ambiguous is confirmed by the split in the circuits. Accordingly, the ambiguity must be resolved in favor of lenity. The more lenient reading of "materiality" is the one under which a falsehood is material only if it affects the computation of one's tax. In light of the foregoing, the decision of the court of appeals must be reconsidered and the judgment of sentence on the tax counts must be vacated.

III. BY ITS UNFORESEEABLE AND RETROACTIVE JUDICIAL EXPANSION OF THE MATERIALITY CLAUSE OF 26 U.S.C. §7206(1), THE COURT OF APPEALS VIOLATES THE PETITIONER'S DUE PROCESS RIGHT OF FAIR WARNING. *BOUIE V. COLUMBIA*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

In *Marks v. United States*, 430 U.S. 188, 191-192, 97 S.Ct. 990, , 51 L.Ed.2d 260, 265 (1977), the Supreme Court explained the manner in which an unexpected judicial enlargement of a criminal statute violates the Due Process right of fair warning:

> "The Ex Post Facto Clause is a limitation upon the powers of the legislature, . . . and does not, of its own force, apply to the Judicial Branch of government . . . But the principle on which the Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. In *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), a case involving the cognate provision of the Fourteenth Amendment, the Court reversed trespass convictions,

finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court:

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, §10, of the Constitution forbids . . . If a legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." Id., at 353-354, 12 L.Ed.2d 894, 84 S.Ct. 1697.

Similarly, in *Rabe v. Washington,* 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972), we reversed a conviction under a state obscenity law because it rested on an *unforeseeable judicial construction of the statute.* We stressed that reversal was mandated because affected citizens lacked fair notice that the statute would be thus applied." (citations omitted, emphasis added)

In *Bouie v. Columbia,* id., 378 U.S. at 352, 12 L.Ed.2d at 899, the Court had further occasion to explain the problem:

> "If the [Due Process Clause] is violated when a person is required 'to speculate as to the meaning of penal statutes', as in *Lanzetta v. New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 880, or to 'guess at [the statute's] meaning and differ as to its application', as in *Connolly v. General Construction Company,* 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity

to engage in such speculation before committing the act in question.

There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in *Pierce v. United States,* 314 U.S. 306, 311, 62 S.Ct. 237, 86 L.Ed. 226, 231, 'judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.' "

In this case, the court of appeals indulges in the suspect business of unforeseeably and retroactively expanding the materiality clause of 26 U.S.C. §7206(1), i.e., expanding it from the class of falsehoods which affect the computation of one's tax to include the class which has a mere potential for an obstructive or inhibitive effect. This unforeseeable and retroactive expansion violates the Due Process Clause of the Fifth Amendment and entitles Mr. Petrone to relief.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted;

. . . /s/ THOMAS A. LIVINGSTON . . .
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September 11, 1987

APPENDIX

NOT FOR PUBLICATION

United States Court of Appeals

For the Third Circuit

No. 86-3474

UNITED STATES OF AMERICA

v.

STEVEN PETRONE, a/k/a Steven Pardee, a/k/a Joseph Thomas, a/k/a Nick Battaglia, a/k/a Pete, a/k/a Thomas G. Gallo, a/k/a Wayne Carson, JAMES SCOTT STROMING, a/k/a Jack Parker, LOUIS BENJAMIN HENDEL, a/k/a Louis B. Kirkland, THOMAS HILL, a/k/a Roy Tamsett, JOSEPH MICHAEL SACCO, a/k/a Tony Ramano, JOSEPH MICHAEL CARLINO, HORACE BYRON GARR, JR., a/k/a George Jensen, CARL SCOTT CARVER, a/k/a Jerry Mitchell, MANDEL TIMOTHY JOHNSTON, a/k/a Manny, DONALD F. TEDESCO, a/k/a Ralph Tedesco, CHARLES WILLIAM MYERS, JOSEPH THERION BARMLETT, FAITH ELLEN BJALOBOK, a/k/a Kathy Morrison, HARRY LNU

Steven Petrone,
Appellant

Appeal from the United States District Court for the Western District of Pennsylvania (Pittsburgh) (D.C. Crim. No. 85-275)

District Judge: Honorable Barron P. McCune

Submitted Under Third Circuit Rule 12(6)
June 15, 1987

PRESENT: SEITZ, MANSMANN, *Circuit Judges*, and DEBEVOISE, *District Judge.**

*The Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

(Filed: June 16, 1987)

MEMORANDUM OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Steven Petrone appeals the judgment of sentence of the district court. We have jurisdiction under 28 U.S.C. §1291 (1982).

I.

On December 12, 1985, Petrone and others were indicted for various drug and tax evasion offenses. On April 17, 1986, pursuant to a plea agreement with the government, Petrone pleaded guilty to the continuing criminal enterprise (C.C.E.) offense and to tax fraud charges for the years 1981 through 1984. After explaining to the defendant the rights he waived by entering a guilty plea and the maximum penalties to which he was exposing himself, the district court engaged in the following colloquy with the defendant:

> Q. Now Count 12 charges this: That on or about April 14, of 1982, you made an income tax return for 1981 which you did not believe to be true and correct because you said you were a salesman for P&T Trucking Company with an income of $10,125.00 when you really didn't work for P&T Trucking Company and the income that you listed was really the repayment of money that you had given the owner of that trucking company in order to conceal the true nature of your income.
>
> Did you know that your tax return for 1981 was not true?

A. Yes, Your Honor.

Q. Now Count 13 charges the same thing with respect to you 1982 return, where you showed an income of $19,769.20.

Did you know your 1982 return was not true?

A. Yes, Your Honor.

Q. Count 14 charges the same thing with respect to you 1983 tax return, on which you showed an income of $20,788.10.

Did you know that your 1983 return wasn't true?

A. Yes, Your Honor.

Q. Count 15 charges the same thing with respect to your return for 1984, where you showed an income of $22,006.16.

Did you know that your 1984 return wasn't true?

A. Yes, Your Honor.

Although the government subsequently described the evidence against Petrone on the C.C.E. offense, the district court required no further elucidation of the factual basis for the tax fraud pleas prior to accepting those pleas. On July 30, 1986, the district court sentenced Petrone on the C.C.E. and the tax fraud offenses. This appeal followed.

II.

Petrone contends that the district court failed to comply with Rule 11(f) of the Federal Rules of Criminal Procedure by failing to develop a factual basis for the pleas to the four tax fraud violations. In particular, Petrone argues

that the record does not reveal facts establishing the materiality element of the tax fraud violations because there is no basis for concluding that the misstatements resulted in an erroneous calculation of tax liability. *See* 26 U.S.C. §7206(1) (1982).

Rule 11(f) provides: "Notwithstanding the acceptance of a plea of guilty, the court should not enter judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." The district court must be satisfied that there exists a factual basis for each element of the offense or it must reject the plea. *See United States v. Allen*, 804 F.2d 244 (3d Cir. 1986); *United States v. Trott*, 779 F.2d 912 (3d Cir. 1986).

Under the tax fraud statute "Any person who . . . willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every *material* matter" is guilty of a felony. 26 U.S.C. §7206(1) (1982) (emphasis added). Materiality of the misstatements, therefore, is an element of a section 7206(1) offense, and under Rule 11 the district court was required to satisfy itself that a factual basis existed in the record for this element of the offense.

There is language in various cases from this and other circuits stating that the materiality element of the offense is established by a showing that the misstatements precluded a proper calculation of tax liability. *See United States v. Graham*, 758 F.2d 879, 886 n.5 (3d Cir. 1985); *United States v. Warden*, 545 F.2d 32, 37 (7th Cir. 1976); *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969). Petrone correctly points out that the record does not establish any factual basis for the conclusion that his false returns

resulted in an inaccurate calculation of tax liability. However, we have never held that a misstatement is material only if it results in a miscalculation of tax liability.

Several circuits have chosen a broad view of materiality, which is consistent with the need for effective enforcement of the tax revenue statutes. *See United States v. Holecek*, 739 F.2d 331 (8th Cir. 1984), *United States v. Greenburg*, [sic] 735 F.2d 29 (2d Cir. 1984); *United States v. Taylor*, 574 F.2d 232 (5th Cir. 1978); *United States v. Romanow*, 509 F.2d 26 (1st Cir. 1975). Under this view, a misstatement is material if it has "the potential for an obstructive or inhibitive effect." *Greenburg*, [sic] 735 F.2d at 31.

We adopt this view. Whether Petrone's actual income for the years in question equalled the amount reported on his tax return, misstatement of the source of that income is material. *See United States v. DiVarco*, 484 F.2d 670 (7th Cir. 1973). Such material misstatements necessarily obstruct the ability of the IRS to verify tax returns. Petrone admitted that he falsely claimed to have been employed by P&T Trucking and to have received income from P&T which was in fact only the repayment of sums transferred to P&T to conceal the source of those funds. These admissions establish a factual basis for the element of materiality and the district court therefore complied with Rule 11(f) in entering judgment on the pleas of guilty to four counts of tax fraud.

Accordingly, we will affirm the judgment of sentence of the district court.

TO THE CLERK OF THE COURT:

Please file the foregoing memorandum opinion.

/s/ SEITZ
Circuit Judge.

United States Court of Appeals

For the Third Circuit

No. 86-3474

UNITED STATES OF AMERICA

v.

STEVEN PETRONE, a/k/a Steven Pardee, a/k/a Joseph Thomas, a/k/a Nick Battaglia, a/k/a Pete, a/k/a Thomas G. Gallo, a/k/a Wayne Carson, JAMES SCOTT STROMING, a/k/a Jack Parker, LOUIS BENJAMIN HENDEL, a/k/a Louis B. Kirkland, THOMAS HILL, a/k/a Roy Tamsett, JOSEPH MICHAEL SACCO, a/k/a Tony Ramano, JOSEPH MICHAEL CARLINO, HORACE BYRON GARR, JR., a/k/a George Jensen, CARL SCOTT CARVER, a/k/a Jerry Mitchell, MANDEL TIMOTHY JOHNSTON, a/k/a Manny, DONALD F. TEDESCO, a/k/a Ralph Tedesco, CHARLES WILLIAM MYERS, JOSEPH THERION BARMLETT, FAITH ELLEN BJALOBOK, a/k/a Kathy Morrison, HARRY LNU

Steven Petrone,
Appellant

Appeal from the United States District Court for the Western District of Pennsylvania (Pittsburgh) (D.C. Crim. No. 85-275)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, *Circuit Judges*, and DEBEVOISE, *District Judge.**

*The Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Circuit Judge

DATED: JULY 14, 1987